



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TAD Trucking Company

File: B-230211.3

Date: August 12, 1988

DIGEST

1. Protest that proposed awardee has an unsatisfactory safety record does not establish that the procuring agency may not make a affirmative responsibility determination in good faith where the agency has investigated the company's safety record and determined that it is satisfactory, and the alleged deficiencies are unsubstantiated.
2. Protest that proposed awardee is ineligible for a contract because of a conflict of interest arising from its relationship with a company which assisted in preparing the solicitation, participated in proposal evaluation, and will administer the contract is denied where there is no evidence that the proposed awardee and the company in question have any relevant business affiliation.

DECISION

TAD Trucking Company protests the proposed award of a cost-plus-fixed-fee contract to Dawn Trucking Company by the Department of Energy (DOE), under request for proposals (RFP) No. DE-RP04-88AL51527, a total small business set-aside for the transportation of radioactive waste to the Waste Isolation Pilot Plant (WIPP), near Carlsbad, New Mexico. TAD contends that Dawn should be found ineligible for award because it does not have a satisfactory performance record and because of an alleged organizational conflict of interest.

We dismiss the protest in part and deny it in part.

DOE issued the RFP to develop the long-term disposal capability at the WIPP. The successful offeror will transport hazardous waste in specially designed and fabricated DOE supplied containers from different locations to

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the WIPP site. DOE will load and unload government furnished containers and trailers. The awardee will provide tractors and technically qualified experienced drivers for a 3-year contract period, with 2 option years.

DOE received 14 proposals by the January 19, 1988, closing date. On February 25, DOE determined that 5 of these 14 were in the competitive range. On April 14, the DOE source-selection official recommended award to Dawn. However, DOE reports that it has neither determined the responsibility of Dawn, nor made a final award decision.

TAD argues that the Federal Acquisition Regulation (FAR) § 9.104-1(c) (FAC 84-18), requires Dawn to demonstrate a satisfactory performance record and that Dawn does not have a satisfactory performance record. In this connection, TAD contends that the Uranium Mill Tailings Remedial Action Bureau (UMTRA), the Colorado state regulatory agency for uranium mill tailings, disclosed that in performing a subcontract for hauling uranium mill tailings in Durango, Colorado, Dawn had incurred several leaks of radioactive material along the haul route. TAD is essentially arguing that Dawn does not qualify as a responsible contractor because of this performance record.

Responsibility relates to a potential contractor's ability to perform the contract, and may include compliance with definitive responsibility criteria included in the solicitation. Here, the contracting officer has not formally determined that Dawn is responsible, but the DOE report makes it clear that an affirmative determination is forthcoming. The contracting officer has a considerable degree of discretion and business judgment in determining the responsibility of a prospective contractor and our Office will not review this determination absent a showing of possible fraud or bad faith on the part of agency procurement officials, or misapplication of definitive responsibility criteria. Armament Engineering Co., B-228445, B-228582, Feb. 8, 1988, 88-1 CPD ¶ 121.

DOE has investigated TAD's allegations and found nothing to support the allegation that Dawn has been unsatisfactorily performing its subcontract in Colorado. On the contrary, DOE reports that Dawn's traffic record was examined at the Department of Transportation Motor Carrier Division and there were no reported incidents of violating regulations, motor vehicle accidents or hazardous waste spillage. Further, DOE reports that the contracting officer contacted UMTRA concerning Dawn's performance on the Colorado contract and UMTRA reported that Dawn has been providing satisfactory

performance within appropriate safety and environmental guidelines. TAD itself states that the agency advised TAD that "it has no formal reports of any radiological incidents" involving Dawn. Accordingly, TAD has not shown that the contracting officer may not make a good faith determination that Dawn is responsible.

TAD further argues that Dawn should not be eligible for the award because of a conflict of interest arising from Dawn's relationship with Westinghouse Corporation, which is the government contractor operating the WIPP. Westinghouse assisted DOE in preparing the RFP and in evaluating proposals and will administer the contract. TAD alleges that Westinghouse is providing financing to Dawn and may have other interests in Dawn and that the FAR and DOE regulations preclude Dawn from competing for the contract because of this arrangement. On this same point, Colorado All State Transportation, Inc., an interested party to the protest, filed comments advising that at least two Uniform Commercial Code financing statements have been filed with the Secretary of the State of New Mexico by Westinghouse claiming a financing interest in specified construction equipment/machinery owned by Dawn.

DOE reports that Dawn and Westinghouse have advised that there is no basis for finding any conflict of interest because any previous contractual relationship between them no longer exists. DOE reports that Dawn was used by Westinghouse Credit Corporation several years ago to store equipment on a temporary basis that had been repossessed from a Westinghouse borrower. DOE states that the relationship involved a customary commercial transaction which did not financially obligate Dawn to Westinghouse and that the parties have completed the transaction. Further, Dawn certified in its proposal that it did not have any conflict of interest related to the work to be performed under the RFP.

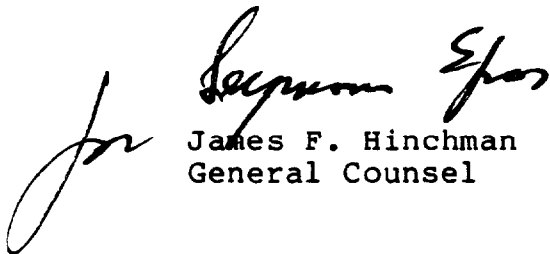
We find no merit to TAD's contention that Dawn is precluded by the regulations from competing for the award because of a conflict of interest. Dawn furnished DOE copies of the financing statements on file in New Mexico. These statements indicate that Dawn was holding property for Westinghouse for custodial purposes and that Dawn had no right to sell, lease, rent or otherwise dispose of the property without Westinghouse's consent. Therefore, the financing statements do not establish that Westinghouse had the kind of financial interest in Dawn that would bias its judgment

with respect to Dawn. Moreover, Dawn and Westinghouse advised DOE that the transaction referenced by the financing statements was completed, and TAD has not offered any evidence to refute this information.

The FAR generally requires contracting officials to avoid, neutralize or mitigate potentially significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, and 9.505 (FAC 84-12). In particular, the FAR provides that if a contractor: (1) prepares or assists in preparing a work statement to be used in competitively acquiring a system or services, or (2) provides material leading directly, predictably, and without delay to such a work statement then the contractor generally may not supply the system or services unless more than one contractor has been involved in preparing the work statement. FAR § 9.505-2(b)(1). This restriction is intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities. Associated Chemical and Environmental Services, et al., B-228411.3 et al., Mar. 10, 1988, 88-1 CPD ¶ 248.

TAD did not allege, nor is there any basis in the record for concluding, that Dawn ever assisted Westinghouse in administering this procurement, and we do not find that the prior relationship between Dawn and Westinghouse precludes Dawn from competing for the contract. The mere fact of a prior or current contractual relationship with a firm does not in itself create an organizational conflict of interest for that firm or that firm's subsidiary. Id. TAD has provided no evidence of any extant meaningful business relationship between Dawn and Westinghouse, and there is no evidence that Westinghouse showed preferential treatment towards Dawn in the procurement.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel